(2)

Supreme Court, U.S.
FILED
APR 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1239

In the Supreme Court of the United States

OCTOBER TERM, 1986

COUNTY OF MARIPOSA AND RODERIC B. SINCLAIR,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

All Asbestos Cases, In re, 603 F. Supp. 599 (D. Haw. 1984) 6

All Maine Asbestos Litigation (PNS Cases), In re, 772 F.2d 1023 (1st Cir. 1985), cert. denied, No. 85-1253 (May 19, 1986) 5

Colombo v. *Johns-Manville Corp.*, 601 F. Supp. 1119 (E.D. Pa. 1984) 6

General Electric v. *United States*, 603 F. Supp. 881 (D. Md. 1985), aff'd, No. 86-2041 (4th Cir. Mar. 12, 1987) 6

Giannuzzi v. *Doninger Metal Products*, 585 F. Supp. 1306 (W.D. Pa. 1984) 6

Griffin v. *United States*, 644 F.2d 846 (10th Cir. 1981) 5

Indian Towing Co. v. *United States*, 350 U.S. 61 (1955) 5

Insurance Company of North America v. *United States*, 643 F. Supp. 465 (M.D. Ga. 1986) 5

Lockheed Aircraft Corp. v. *United States*, 460 U.S. 190 (1983) 3, 4, 7

Roelofs v. *United States*, 501 F.2d 87 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975) 5

Stewart v. *United States*, 716 F.2d 755 (10th Cir. 1982), cert. denied, 469 U.S. 1018 (1984) 5

Page

Statutes:

Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.* 1

5 U.S.C. 8116(c) 6, 7

Federal Tort Claims Act:

28 U.S.C. 1346(b) 2

28 U.S.C. 2674 2

Cal. Labor Code (West 1971):

§ 3600.5(b) 4, 8

§ 3864 ..... 2, 3

Miscellaneous:

H.R. Rep. 729, 81st Cong., 1st Sess. (1949) 6, 7

Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 Duke L.J. 483 6

S. Rep. 836, 81st Cong., 1st Sess. (1949) 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1239

COUNTY OF MARIPOSA AND RODERIC B. SINCLAIR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek contribution from the United States for a portion of the tort damages they paid to the estates of three federal employees who were killed in an automobile accident, even though petitioners could not obtain contribution from a private employer under similar circumstances.

1. Three federal Secret Service agents died, while acting within the scope of their employment, when their automobile collided with an automobile driven by Deputy Sheriff Sinclair of the County of Mariposa in California on March 5, 1983. The survivors of the Secret Service agents received payments from the federal government under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et*

BEST AVA

seq. They also sued petitioners—Sinclair and the County of Mariposa—seeking damages for the wrongful deaths. Petitioners then filed claims against the United States for contribution and indemnity, contending that the collision was in part caused by the negligence of the deceased driver and the negligence of another federal employee driving a third car that was not involved in the collision. The estates of the deceased federal employees subsequently settled all claims with petitioners for $4 million. Pet. App. B2.

Following the settlement, petitioners proceeded with their third-party claim against the United States. Under the Federal Tort Claims Act (FTCA), the federal government is liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b)), so that its liability is the same as that of "a private individual under like circumstances" (28 U.S.C. 2674).[1] The district court did not dispute that the United States should be analogized to a private employer in California. Nor did the district court dispute that, under applicable California law, Cal. Labor Code § 3864 (West 1971), employers that provide workers' com-

---

[1]Section 1346(b) provides in pertinent part:

> [T]he district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674 provides in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

LABLE COPY

pensation are immune from third-party actions.[2] The district court ruled, however, that this court's decision in *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), where the Court held that FECA does not itself bar third-party actions against the United States, precludes analogizing the United States to a private employer in California for purposes of determining whether third parties may recover from the United States (Pet. App. D6). The district court found petitioners 70% responsible for the accident and the agents of the United States 30% responsible, and accordingly awarded petitioners $1.2 million (Pet. App. C9).

2. The court of appeals reversed (Pet. App. B1-B9). The court first found that the United States is analogous to an employer that had complied with the California workers' compensation law since it had made payments to the Secret Service agents' survivors under FECA. It noted that a number of courts have held, after *Lockheed*, that "the United States should be entitled to the same immunity from suit enjoyed by a private employer covered by state workmen's compensation laws" (*id.* at B6). It therefore concluded that the United States is entitled to the benefits of the exclusive liability provision of Cal. Labor Code § 3864 (see note 2, *supra*), which bars third-party claims as well as direct claims (Pet. App. B6). This Court's decision in *Lockheed* does not compel a different result, the court concluded, explaining that *Lockheed* "did not confer on third-party tortfeasors

---

[2]California Labor Code § 3864 provides:

> If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.

substantive rights against the United States. The case held only that the FECA did not modify the Federal Tort Claims Act so as to bar directly third-party suits that the applicable state law would otherwise allow. See 460 U.S. at 197-99 & n.8." Pet. App. B5.

The court of appeals also concluded that, even assuming the United States is properly viewed as an out-of-state employer complying with a foreign state's workers' compensation laws rather than as a California employer, petitioners nevertheless have no substantive right to contribution. California law provides that the remedies under the laws of the foreign state are the exclusive remedies against an out-of-state employer for any injury received by nonresident employees working in California. Cal. Labor Code § 3600.5(b) (West 1971).[3] While FECA, the relevant out-of-state workers' compensation law, does not bar a third party suit, it does not provide any substantive entitlement to bring a third-party suit either, as this Court made clear in *Lockheed*. Given that petitioners had identified no substantive basis for suit, the court held that their claim was barred. Pet. App. B8.[4]

---

[3]California Labor Code § 3600.5(b) provides in pertinent part:

> Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state * * *. The benefits under the Workmen's Compensation Insurance Act or similar laws of such other state, or other remedies under such act or such laws, shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.

[4]The court of appeals noted (Pet. App. B9 n.2) that it was puzzled that the district court attributed the negligence of the deceased federal driver to the United States in determining that the United States was 30

3. The court of appeals' decision is correct and is consistent with the decisions of this Court and other federal courts. Accordingly, further review is not warranted.

The court of appeals correctly concluded that the United States is properly analogized to a private employer in California that pays compensation pursuant California's workers' compensation law, since the FTCA provides that the United States is to be treated like a private employer and the United States pays workers' compensation under FECA.[5] That is a perfectly straightforward analogy that a number of courts have adopted. See *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023, 1027 (lst Cir. 1985), cert. denied, No. 85-1253 (May 19, 1986); *Stewart* v. *United States*, 716 F.2d 755, 763 (10th Cir. 1982), cert. denied, 469 U.S. 1018 (1984); *Griffin* v. *United States*, 644 F.2d 846, 847 (10th Cir. 1981); *Roelofs* v. *United States*, 501 F.2d 87, 92 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975); *Insurance Company of North America* v. *United States*, 643 F. Supp. 465, 467-468 (M.D. Ga. 1986);

---

percent responsible for the collision, since petitioners had settled with his estate and the parties to the settlement presumably took his negligence into account in reaching their agreement. The court added that petitioners could recover based on the negligence of another federal driver who was not injured in the collision if the third-party suit were not barred. Thus, had the court of appeals not reversed the district court, it presumably would have remanded for the district court to determine the percentage of responsibility for the accident properly attributable to the United States based only on the negligence of the federal driver that was not killed in the collision.

[5]There is no merit whatever to petitioners' contention (Pet. 12-13) that the United States is not analogous to a private employer in California because it does not actually participate in the California workers' compensation program but instead pays workers' compensation under FECA. As the court of appeals noted in dismissing that argument, the FTCA "refers not to private persons under 'the same circumstances,' but to those under similar circumstances" (Pet. App. B6, quoting *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64 (1955)).

General Electric v. *United States*, 603 F. Supp. 881, 884 (D. Md. 1985), aff'd per curiam, No. 86-2041 (4th Cir. Mar. 12, 1987); *In re All Asbestos Cases*, 603 F. Supp. 599, 607-608 (D. Haw. 1984); *Colombo* v. *Johns-Manville Corp.*, 601 F. Supp. 1119, 1127-1128 (E.D. Pa. 1984); *Giannuzzi* v. *Doninger Metal Products*, 585 F. Supp. 1306, 1309 (W.D. Pa. 1984). Petitioners do not contend that any court has held to the contrary.

Under the FTCA, the liability of the United States to third parties depends on the law of the state where the tort occurred. In the majority of states, compensation-paying employers are immune from third-party actions (see Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 Duke L.J. 483, 488-489). Since California is one of those states, the United States is immune from third-party suits there.[6]

---

[6]Under FECA's exclusivity clause, 5 U.S.C. 8116(c), the United States is never liable under the FTCA to employees to whom it pays FECA benefits. Petitioners note that Congress stated in 1949, when it added Section 8116(c) to FECA, that most states provided that workers' compensation remedies were the exclusive remedies employees could obtain from their employers. S. Rep. 836, 81st Cong., 1st Sess. 23 (1949); H.R. Rep. 729, 81st Cong., 1st Sess. 14 (1949). Petitioners therefore argue (Pet. 9) that Congress must have thought that bars to suit enacted by state laws did not apply to the United States since, otherwise, it would not have needed to enact Section 8116(c). That is incorrect. First, the reports accompanying the 1949 amendments both stated that state laws "in general" barred employees from seeking recovery from employers in addition to workers' compensation (S. Rep. 836, *supra*, at 23; H.R. Rep. 729, *supra*, at 14), implying that Congress thought that some states allowed additional recoveries. Indeed, the House Report stated that Congress did not intend "to give Government employees, *or rather some of them*, the right to sue the United States, in addition to or as an alternative to the right to workmen's compensation" (H.R. Rep. 729, *supra*, at 15 (emphasis added)), suggesting that Congress recognized that the laws of most states already barred tort recoveries by federal employees who had received FECA benefits and intended that rule to apply in all states. In addition, Section 8116(c) was hardly unnecessary even if Congress thought that no state permitted

The conclusion that the United States is immune from third-party claims in California and other states where compensation-paying employers are immune is not contrary to this Court's decision in *Lockheed*. As the court of appeals explained (Pet. App. B5), the Court in *Lockheed* did not hold that FECA provided a substantive basis for bringing a third-party suit but only that it did not *bar* such suits where they were permitted. The Court expressly noted that the lower courts had concluded that "indemnity is available to Lockheed against the United States" and that the correctness of that conclusion was not before the Court (460 U.S. at 197 n.8). Here, as the court of appeals stated (Pet. App. B6), petitioners have failed to identify a substantive basis for their third-party claim. There is, therefore, no conflict between the decisions, as petitioners themselves recognize by stating that "*Lockheed* did not expressly consider the question presented here" (Pet. 7).

Nor is there any merit to petitioners' argument (Pet. 13-15) that the United States is properly analogized to an out-of-state employer under California law because the Secret Service agents were in the state on a temporary assignment and that the United States is not immune from suit as an out-of-state employer. As an initial matter, this argument depends on the peculiar facts of this case and does not warrant the Court's attention for that reason alone. Moreover, as the court of appeals concluded, it is clear that the United States is more analogous to a national employer doing business in California than it is to a private employer doing business outside California that "happens to have

---

direct tort actions by employees against compensation-paying employers, since Congress enacted Section 8116(c) to bar suits by federal employees against the United States under the Suits in Admiralty Act and the Public Vessels Act, which are not governed by state law, as well as to bar suits by federal employees against the United States under the FTCA. S. Rep. 836, *supra*, at 23; H.R. Rep. 729, *supra*, at 14.

brought in a few employees for a temporary job in-state" (Pet. App. B8), since the United States in fact employs many persons in California. Therefore, California's out-of-state employer rule is not applicable. Even if the United States is analogized to an out-of-state employer, under Labor Code § 3600.5(b) the law of the employer's "state"—here federal law—provides "the exclusive remedy against such employer for any injury" (*ibid.*), and it provides no substantive basis for this suit, as the court of appeals also noted (Pet. App. B8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1987